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IN THE

Supreme Court of the United States

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October Term, 1971
No. 71-662

RAYMOND CARL ROHM, CYNTHIA LOUISE DREY, GERALDINE CLARK ORTH and REBECCA DARLENE MORRIS,
Petitioners,

vs.

STATE OF CALIFORNIA,
Respondent.

Answer to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California.

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Statement of the Case.

Petitioners, after a court trial had in the Municipal Court of Orange County Harbor Judicial District, were found guilty of having violated California Penal Code Sections 314.1 and 314.2, respectively, which state:

> Every person who wilfully and lewdly, either
>
> 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or
>
> 2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

The facts upon which the convictions are bottomed are set forth in the Opinion of the Municipal Court to be found at pages five and six of the Appendix to the Petition and are as follows:

> One case described the above action plus adding that the dancer rubbed her pubic hairs with her hand (*People vs. Orth*, M-56383).
>
> In the case of *People vs. Drey* (M-56926) the defendant spread her legs far apart within a few inches of the customers' faces; raised her leg above customers' faces with her vagina within 2 to 3 inches from their faces; leaned forward toward 3 or 4 customers and allowed her breast to be licked by the customers' tongues; leaned over and placed her breast in a glass of beer located on the bar counter in front of the customer; held popcorn 3 to 4 inches from her vagina and allowed customers to remove the popcorn with their mouths. This was repeated with 2 or 3 different customers. Defendant turned her back on the customers, spread her legs and with her anus 4 to 6 inches from the customer's face lit a match and placing her arm between her legs lit a customer's cigarette. This was repeated 2 or 3 times with different customers. Defendant also lit a cigarette, balanced it on her nipple and invited a customer to take it from this position with his mouth.
>
> In the case of *People vs. Drey* (M-56519) the defendant allowed a customer to light a match and hold it close to her pubic area within 18 inches of the customer's face. In the case of *People vs. Drey* (M-56502) the defendant made lewd ges-

tures to customers suggesting sexual intercourse and oral copulation.

In *People vs. Morris* (M-56882) the defendant placed one foot on the bar counter standing spread legged 4 to 6 inches from the customers and simulated sexual intercourse; raised her leg above the customers' heads, bringing her vagina within 3 to 5 inches from the customers' faces. This action was repeated numerous times.

In the remaining case of *People vs. Rohm* (M-56944) the defendant, the manager of the Firehouse Bar, was shown to be present on the occasions in which the conduct described in *People vs. Drey* (M-56926) and *People vs. Morris* (M-56882) took place.

The Appellate Department of the Orange County Superior Court in affirming the Judgments (See Appendix to Petition, pp. 1-2) stated:

> The activities of the bottomless dancers in these particular cases, however, were not part of any genuine dance, did not constitute a "theatrical performance," did not enjoy, *prima facie*, protection of the First Amendment, and could, therefore, be prosecuted under Section 314.1 of the Penal Code despite *Barrows v. Municipal Court*, 1 Cal.3d 821 (1971).
>
> The guilt of the bar owner in case No. Ap 1052 (Rohm) under Penal Code Section 314.2 seems amply clear on the record before us.

Petitioners upon conviction fell under the State registration requirements (California Penal Code Section 290) which applies to all those who are considered sex offenders.

Issues Presented.

I.

Whether Petitioner has Properly Raised the Federal Question it Seeks to Litigate.

II.

Whether a State Requirement that Sex Offenders must Register with the Police at Given Times and Places is Unconstitutional.

III.

Whether "Indecent Exposure", a Crime under California Law Changes Character so as to Render the Application of Registration Requirements Unconstitutional because in Violation of First Amendment Rights when the Crime Occurs on a Stage in a Beer Bar.

ARGUMENT.

I.

Petitioners Have Failed to Properly and Timely Raise the Federal Question so as to Give This Honorable Court Jurisdiction.

The Petition merely alleges at page 8 of the Petition that:

> On December 2, 1970, petitioners demurred to the complaints; said demurrers were overruled. Said demurrers were based upon the proposition that the complaints had failed to state public offenses and that a person charged with presenting obscene entertainment could not be convicted of a crime which required registration as a sex offender.

A Demurrer in the State of California is controlled by California Penal Code Section 1004 which provides in its pertinent part that:

> The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, *when it appears upon the face thereof* either:
>
> 1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;
>
> 2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;
>
> 3. That more than one offense is charged, except as provided in Section 954;
>
> 4. That the facts stated do not constitute a public offense;
>
> . . .

In the case at hand the complaints (See Petition, Appendix C, D, E and F) merely allege violation of Penal Code section 314. Argument on the applicability of Penal Code Section 290 to the conduct involved would thus be improper on demurrer.

Moreover, the federal question presented here is *not* the applicability of Penal Code Section 314 to the conduct in question *but* the propriety of the application of the registration requirements imposed by Penal Code Section 290 to a conviction based on conduct such as here involved. *This* issue was never presented and never determined by the state courts.

Considering that Penal Code Sections 290.5 and 1203.4 allow for relief from the provisions of Penal Code Section 290 in certain instances and under certain conditions, it might well be that, had the State Courts been properly presented with the problem at the time of sentencing or on appeal, they might have made a determination favorable to Petitioners.

Under the circumstances, therefore, Rspondent submits that Petitioner having failed to comply with Rule 23(f) of the *Rules of the Supreme Court of the United States*, the federal question has not been properly presented and the Petition should be denied.

II.

A State Statute Requiring Sex Offenders to Register With the Police Department at Certain Times and Places Is Not Constitutionally Prohibited.

Statutes requiring registration by various types of criminals have not *per se* been held to be unconstitutional. Thus *Lambert v. California*, 355 U.S. 225, 2 L.Ed.2d 228, 78 S.Ct. 240; for example, found that requiring a felon to register as such was proper pro-

vided that no conviction could be had where the defendant was not aware of the requirement. The Court in that case narrowly framed the issue by stating:

> The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge.

The Court, in that case, however, recognizes and reaffirms the validity of registration laws and goes on to say:

> Registration laws are common and their range is wide. *Cf. New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61, 62 A.L.R. 785; *United States v. Harriss*, 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808; *United States v. Kahriger*, 345 U.S. 22, 97 L.Ed. 754, 73 S.Ct. 510.

The dissenting opinion points out:

> The present laws of the United States and of the 48 States are thick with provisions that command that some things not be done and others be done, although persons convicted under such provisions may have had no awareness of what the law required or that what they did was wrongdoing. The body of decisions sustaining such legislation, including innumerable registration laws, is almost as voluminous as the legislation itself. The matter is summarized in *United States v. Balint*, 258 U.S. 250, 252, 66 L.Ed. 604, 605, 42 S.Ct. 301:
>
> "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the

> statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se."

The California Supreme Court, while holding the registration requirement statute to be constitutional in *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, found the Los Angeles ordinance void because it held the field to have been preempted by California Penal Code Section 290. Subsequently, in *Barrows v. Superior Court*, 1 Cal.3d 821, 835-836, the Supreme Court reiterated the validity of the section and set forth the *purpose* of the section as being properly related to crime prevention. The section, says the Court:

> applies automatically when a person is convicted of one of the enumerated offenses and imposes a lifelong requirement of registration and re-registration absent a court order releasing the registrant from the penalties and disabilities of his conviction under section 1203.4 (*People v. Taylor* (1960) 178 Cal.App.2d 472, 477 [3 Cal.Rptr. 186]) or the issuance of a certificate of rehabilitation under section 4852.01 et seq. (§ 290.5). The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. (*Kelly v. Municipal Court* (1958) 160 Cal.App. 2d 38, 45 [324 P.2d 990].)

In light of the above authorities Respondent submits that if the evidence in this case supports the finding that Petitioners violated *not* an obscenity statute but an *indecent exposure* statute, Penal Code Section 290 as applied to crimes of a sexual nature must be found to be proper.

III.

The Type of Conduct Here Involved Is Not Protected by the First Amendment and Its Punishment Cannot Possibly "Chill" the Exercise of First Amendment Rights.

California Penal Code Section 314 prohibits lewd and indecent exposure in a public place. Both the Municipal Court and the Appellate Department of the Superior Court in this case properly found that conduct *not* to be part of a performance, and the conduct of Petitioners is certainly "lewd" and just as certainly "nude". The fact that what was done was done on a raised platform rather than in the street does not make the indecent exposure more of a performance and less a crime of a sexual nature. Here as in *Hoffman v. Carson*, 250 So.2d 891, 893, appeal dismissed by This Honorable Court on December 7, 1971, "for lack of a federal question", Petitioners urge that:

> Her actions are interpretations of accompanying music, and that this is her means of communicating her ideas of freedom to the assembled patrons of the lounge. It is asserted that this method of expression is a form of speech warranting the protection of the First Amendment, unless found to be obscene under the *Roth-Memoirs* test of obscenity. *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1959); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966).

And here as in that case it must be concluded that:

> Appellant loses sight of the distinction between speech and conduct. The statute is not directed at

> First Amendment rights of free expression, nor does it concern itself with obscenity as does Fla. Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law [*e.g. Commonwealth v. Broadland*, 315 Mass. 20, 51 N.E.2d 961 (1943); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241 (1952)], and generally considered as having a reasonable relationship to the public welfare, and, therefore, within the police power of the Legislature.

As so aptly stated by Justice Gardner in *Crownover v. Musick*, 18 Cal.App.3d 181, 189 (hearing granted by the California Supreme Court on other grounds):

> This portion of Ordinance No. 2356 has no chilling effects on any First Amendment rights of naked waitresses and waiters. Any chill they experience comes from their nudity, not from Ordinance No. 2356.

Petitioner cites as the sole authority in support of his position the California Supreme Court opinion of *Barrows v. Municipal Court*, 1 Cal.3d 825, 826-827. That case, however, argues the inapplicability of California Penal Code Section 290 to *simulated sexual* acts performed on stage—more specifically to a simulated act within the context of a play. It is not and was never intended to apply to real acts. That court states:

> It would be irrational to impose upon an *actor* in a *theatrical performance* or its director a lifetime requirement of registration as a sexual offender because he may have performed or aided in the performance of an act, *perhaps an obscene gesture, in a play.*

That court goes on to caution against the broad interpretation of the opinion which Petitioners suggest:

> Our holding here does not suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course *of a theatrical* play. Dramatic *license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero. (emphasis added)*

What Petitioners indirectly suggest is that no act punishable under Section 290 can be prosecuted against if performed on a stage. Let us assume the play entitled *The Beard*, instead of ending with an act of *simulated oral copulation* had ended with actual oral copulation. Can it be seriously contended that the act could not be punished? A careful analysis shows that the decision, while in many ways incongruous, is not that far fetched. Can it be in fact said that the girl who acts the part of the prostitute in a play is guilty of soliciting? Can the girl who plays Lady Chatterly be guilty of adultery? Of course not! And the reason is clear: A play is a make-believe world where an act cannot be taken out of context from the totality of the performance.

That the *Barrows* decision is limited to theater plays and is not applicable to *all* forms of entertainment can be deduced from the language of the decision. While the court begins with the sweeping statement that 647(a) "was not intended to apply to a live theatrical performance before an audience," the later language of the court is far more restrictive. The opinion in fact goes on to say:

> We begin with the premise that live plays performed in a theater before an audience are entitled to . . . protection.

After an in-depth history of the origin of the theater and of Section 647(a), the Court concludes:

> We hold here *only* that the consequences of applying Section 647, subdivision (a), to *acts performed in a play* . . . all indicate that the legislature did not intend those statutes (to wit: 647a and 311.6) to apply to theatrical performances. (*emphasis added*)

The totality of the *Barrows'* opinion therefore argues against rather than for Petitioners' contention. And Respondent thus respectfully submits that where as here the conduct constituted not an infringement of the obscenity law but a crime of a sexual nature, California Penal Code Section 290 is just as properly and constitutionally applied as if the conduct had occurred in the middle of the town's Main street and for the very same reasons.

Accordingly, and for all the above reasons, Respondents urge This Honorable Court to deny the Petition.

Dated this 1st day of March, 1972.

Respectfully submitted,

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